

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 04-10387-RGS
	)	
WILLIE DANCY	)	

POST-HEARING MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Defendant, Willie Dancy, submits this Post-Hearing Memorandum In Support Of Defendant's Motion To Suppress Evidence to supplement the previously filed pleadings and to address issues raised during the evidentiary hearing conducted over the following dates: November 15, 2005; December 20, 2005; and November 7, 2006. For the reasons set forth below, as well as for those reasons set forth in defendant's initial Motion To Suppress Fruits of Illegal Arrest and supporting memorandum, the physical evidence seized and statements given by the defendant on December 8, 2004 must be suppressed.

The evidence at issue was obtained by members of the Brockton and Massachusetts State Police as the result of a de facto arrest of Mr. Dancy without probable cause in violation of the Fourth Amendment to the United States Constitution. At the time that officers encountered Mr. Dancy inside a Brockton bar, he was not observed engaging in criminal activity and the police did not see him handling or carrying a weapon. There was also no

reasonable suspicion upon which to conduct a pat-frisk of his person for weapons.

STATEMENT OF FACTS

For purposes of this supplemental memorandum, the defendant will focus primarily on the actions of Trooper Francis Walls ("Walls") of the Massachusetts State Police. Trooper Walls was the officer who physically restrained Mr. Dancy immediately upon entering Boomer's Bar ("Boomer's") in Brockton, Massachusetts, on December 8, 2004. The actions of Walls and his fellow officers in the minutes after entering the bar were tantamount to an arrest of Mr. Dancy without probable cause.

On the night of December 8, 2004, Trooper Walls was working in Brockton alongside local police officers in his capacity as a member of the Massachusetts State Police Gang Unit. Tr. 12/20: 50.<sup>1</sup> Trooper Walls was working with fellow state trooper Sergeant Mark Kiley ("Kiley") on a plainclothes patrol in an unmarked car. At around 9:00 p.m. that night, Walls received a general radio transmission from Detective Mark Reardon ("Reardon") of the Brockton Police.<sup>2</sup> According to Walls'

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<sup>1</sup> Citations to the record will be in the format of date followed by page. Thus, a citation to page 25 of the November 15 transcript will appear as 11/15: 25.

<sup>2</sup>The government has represented that it was informed by the Brockton Police that the recording or turret tape of this radio

testimony at the suppression hearing in this case, his memory was that Reardon stated that he had just observed a male fire a firearm in the air and then run into Boomer's. Tr. 12/20: 51.<sup>3</sup>

Walls and Kiley responded to the call and drove to Boomer's. Before entering the bar, Walls and Kiley met briefly with Officers Hyland ("Hyland") and Cesarini ("Cesarini"), and Detective Reardon of the Brockton Police. Although Reardon had lost sight of the person who fired the gun about a city block away from the bar (Tr. 11/15: 53, 54), the group of officers split up so they could search the notorious locale for anyone who might fit the broadcast description. Kiley and Hyland were with Trooper Walls and they entered the bar through the rear door while Reardon and Cesarini entered through the front door.

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transmission does not exist due to some type of malfunction that prevented the taping of transmissions in general over a two week period including December 8, 2004. Defendant is submitting a turret tape recording for the Court's review which was turned over by the government and contains recorded radio calls of all other aspects of the arrest of Mr. Dancy on December 8, 2004. The Brockton Police were apparently able to record everything except Detective Reardon's radio description of the suspect due to this apparent "malfunction".

<sup>3</sup>Detective Reardon testified that he never actually saw the person who fired the weapon on the street enter Boomer's Bar. Tr. 11/15: 53-54. This discrepancy between the testimony of these officers highlights the problems that have been created by the Brockton Police's inability to produce the turret tape recording of Detective Reardon's original radio call containing the description of the shooter.

Trooper Walls was the first to enter Boomer's through the rear door and immediately saw Mr. Dancy walking toward him. Walls was readily identifiable as a police officer as he was wearing a Massachusetts State Police sweatshirt and his badge and sidearm were visible on his belt. Tr. 12/20: 55, 56. Mr. Dancy turned away from Walls as he, Sergeant Kiley and Officer Hyland entered the bar. When Mr. Dancy turned away from the officers, he did not run or act in a suspicious manner, he simply walked in the other direction. Tr. 12/20: 92. Walls recalled that as Dancy turned away, he moved his right hand toward his right jacket pocket. Walls then physically grabbed Dancy by the arm and a struggle began. Id.

Upon first seeing Mr. Dancy, Trooper Walls noted that he seemed to fit, although not in every respect, the description of the shooter that Detective Reardon had relayed over the radio earlier in the evening. That description was of a black male with a "cornrow" hairstyle who was wearing a sweatshirt with lettering on it and dark jeans. Tr. 12/20: 56. Reardon had also allegedly described the individual as looking like a person named David Taylor. Id.<sup>4</sup>

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<sup>4</sup>Officer Hyland testified that he heard Reardon's radio call and that he mentioned a gray sweatshirt, dark blue jeans, "and he mentioned a name." Tr. 12/20: 88. "I wasn't familiar with the name, and I can't recall who it was." Tr. 12/20: 88. The absence of the turret tape again makes it impossible to determine

Although Mr. Dancy was in fact a black male with a "cornrow" hairstyle, he was wearing a hooded sweatshirt, dark jeans, and a black leather jacket. Detective Reardon's radio transmission never mentioned that the shooter was wearing a black leather jacket. Tr. 12/20: 72. In addition, there were a number of other African-American men in the bar that evening who fit some, if not all, aspects of Reardon's general description including Mr. Michael Bourne. Tr. 11/7: 29, Suppression Hearing Exhibits 14 (booking photograph of Michael Bourne) and 3 (photograph of David Taylor). Lastly, when Trooper Walls and Officer Hyland grabbed Dancy, they had not been given confirmation by Detective Reardon, who was in the bar at that time, that Dancy was in fact the person he had just seen firing a gun out on the street. Tr. 12/20: 72.

At the moment that Mr. Dancy turned away from him, Trooper Walls ignored the very real possibility that he was not dealing with the person that Detective Reardon had described and he reflexively proceeded to restrain him by grabbing his right arm and hand. Upon grabbing Mr. Dancy's right hand, which was still in his jacket pocket, Trooper Walls felt a hard object through the jacket and inside Dancy's hand that he concluded was a gun.

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whether Detective Reardon actually said over the radio that it was David Taylor that he saw or whether it was someone who "looked like" David Taylor.

Tr. 12/20: 58. Walls yelled "gun" to the other officers and he began to physically struggle with Mr. Dancy who was telling him he did not have gun and to get off of him. Id.

In the confusion that followed, Mr. Dancy was physically restrained by both Trooper Walls and Officer Hyland. Eventually, Officer Cesarini also became involved and used pepper spray on Mr. Dancy while he was being held down. During the struggle, Trooper Walls claimed he never released Mr. Dancy's right hand for fear that he might pull a weapon out of his pocket. Tr. 12/20: 74-75. He claims to have maintained a grip on that weapon in Dancy's pocket for the duration of the struggle. Id. In stark contrast to this testimony, Walls also stated that at some point during the struggle, Mr. Dancy was able to somehow get his right hand out of that jacket pocket. He went on to testify that Dancy made an attempt to hand the gun's cylinder off to Michael Bourne. Tr. 12/20: 60-61.<sup>5</sup>

Once Mr. Dancy was subdued by Walls, Hyland, and a shot of pepper spray from Cesarini, Walls testified that he himself removed the .22 caliber handgun from the right pocket of the black leather jacket. Tr. 12/20: 73. Walls stated that Hyland

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<sup>5</sup>Officer Hyland, who was standing right next to Walls, never saw Mr. Dancy try to hand anything to Michael Bourne. He simply saw the .22 caliber handgun hit the floor in the vicinity of the struggle between Walls and Dancy and that is when the cylinder apparently came loose from the gun's frame. Tr. 12/20: 104.

was with him when he recovered the gun. Id. Mr. Dancy was arrested and taken back to the Brockton Police Department for booking. Michael Bourne ("Bourne") and Kevin Jones ("Jones") were in the rear area of the bar where Mr. Dancy was restrained by the police. Jones was arrested and charged with possession of a 9mm handgun that he apparently tried to discard in the area where Mr. Dancy was standing when the police entered the bar. Tr. 12/20: 97. Bourne was also arrested for acting in a disruptive manner when the officers arrested Dancy and Jones.

#### ARGUMENT

- I. WHEN MULTIPLE POLICE OFFICERS PHYSICALLY RESTRAINED AND MACED MR. DANCY, THEY CONDUCTED A DE FACTO ARREST REQUIRING PROBABLE CAUSE.

A de facto arrest, requiring probable cause as opposed to the lesser standard of reasonable suspicion, comprises a tier of Fourth Amendment analysis of interactions between law enforcement officials and citizens. An arrest occurs when an officer, acting on probable cause that an individual has committed a crime, detains that individual as a suspect. Probable cause exists when police officers, relying on reasonably trustworthy facts and circumstances, have information upon which a reasonably prudent person would believe the suspect had committed or was committing

a crime. See United States v. Maguire, 918 F.2d 254, 258 91<sup>st</sup> Cir.1990), cert. denied.

In United States v. Trueber, 238 F.3d 79, 93 (1<sup>st</sup> Cir.2001), the First Circuit laid out a series of factors for consideration when trying to determine if a person has been subjected to a de facto arrest before he or she is formally arrested. These factors include: whether the person is confronted by law enforcement officers in a familiar or neutral setting; the number of law enforcement officers present at the scene; the degree of physical restraint placed on the person; and the duration and character of the encounter. Id.

In Mr. Dancy's case, the immediate and aggressive actions of Trooper Walls and his fellow officers transformed his encounter with them into a de facto arrest requiring probable cause. Police conduct will rise to the level of an arrest when "'a reasonable man in the suspect's position would have understood his situation," in the circumstances then obtaining, to be tantamount to being under arrest." See United States v. Zapata, 18 F.3d 971, 975 (1<sup>st</sup> Cir.1994) (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).

Trooper Walls entered Boomer's and immediately saw Mr. Dancy walking toward him. Walls was wearing a Massachusetts State Police sweatshirt and his gun and badge were visible on his belt. Sergeant Kiley and Officer Hyland entered the bar with Walls.

Tr. 12/20: 92. Upon seeing these police officers, Dancy turned away, without running, and Walls immediately grabbed at his right arm. Dancy told Walls to let him go but he was wrestled to the ground by Walls and Hyland.

For purposes of determining the issues placed before the Court in Mr. Dancy's Motion to Suppress, the defendant argues that the weight of the credible evidence produced at the suppression hearing suggests that Trooper Walls did not see Mr. Dancy make any suspicious movement toward his jacket pocket as he turned away from the police. Officer Hyland, who was standing right next to Walls at the critical time, did not testify that he saw Dancy make such a movement. Tr. 12/20: 92. Detective Reardon testified that he spoke directly to Trooper Walls in the immediate aftermath of the arrest and that Walls told him everything that happened with Dancy. Tr. 11/15: 55. He incorporated this information into his arrest report. Reardon stated in his arrest report that upon seeing Walls, Dancy turned away and walked in the opposite direction. Suppression Hearing Exhibit 7. There is no mention in the report of any suspicious movement of Dancy's right hand toward his jacket pocket or that Walls was in fear for his safety as result. Id.

Finally, the Government's Memorandum of Law in Opposition To Defendant's Motion to Suppress Evidence presents the same factual scenario as do Officer Hyland and Detective Reardon. In its

pleading, the Government took the position that Mr. Dancy turned and attempted to flee when confronted by Walls and the other officers. See Government's Memorandum pp. 5, 14 ("Upon seeing the officer, this suspect, on that Trp. Walls believed to be armed with a loaded handgun, turned abruptly and attempted to flee."). There is never any mention of a suspicious hand movement observed by Walls in the Government's filing.

If the Court agrees that Dancy simply turned to walk away, then the physical restraints imposed upon Mr. Dancy by Trooper Walls and Officer Hyland were excessive under the circumstances. In addition, the Court must consider any other coercive factors involved in the encounter. For example, the number of officers present who were involved in restraining Dancy. Along with Trooper Walls, there were at least three other officers present who either became physically involved with Mr. Dancy or who were in his immediate proximity. There were five or more police officers in the bar at the time of the encounter with Dancy. Officer Hyland and Sergeant Kiley entered the bar with Trooper Walls. Officer Cesarini approached the area of the pool tables, where Mr. Dancy was located, with his weapon drawn. Tr. 11/7: 18. Detective Reardon followed him. Cesarini eventually became directly involved with Dancy when he attempted to handcuff him and then used pepper spray on him. Tr. 11/7: 20.

The physical restraint and macing occurred **before** the .22 caliber firearm was actually picked up off of the floor by Officer Hyland and Mr. Dancy was formally arrested. Emphasis Added.<sup>6</sup> When these armed police officers wrestled Mr. Dancy to the ground and then maced him, they imposed restraints on his person that were "'comparable to those of a formal arrest.'" See United States v. Quinn, 815 F.2d 153, 156-57 (1<sup>st</sup> Cir.1987) (quoting Berkemer, 468 U.S. at 441). Moreover, this was much more than *de minimis* physical contact and any reasonable person in Dancy's position would have understood his situation "to be tantamount to being under arrest." Zapata, 18 F.3d at 975; contrast United States v. Young, 105 F.3d 1 (1<sup>st</sup> Cir.1997) (police officer lunging at a suspect from the window of a police car and brushing his hand against him did not elevate the encounter from an investigative stop to a *de facto* arrest).

If the Court agrees that Walls and his fellow officers conducted a *de facto* arrest, it must also conclude they did not have probable cause upon which to do so. When the officers entered Boomer's, they were not sure that they would find the

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<sup>6</sup>The testimony of Trooper Walls and Officer Hyland is again at odds regarding how the .22 caliber handgun was recovered. Walls testified that he recovered the firearm, or a portion of it, from the pocket of Dancy's leather jacket. Hyland testified that he recovered the .22 himself from the floor of the bar in the area of the struggle with Dancy.

person who Detective Reardon observed firing a gun in the vicinity. Detective Reardon himself admitted that he never saw the shooter enter the bar. Tr. 11/15: 53-54. This was a calculated guess, at best, and the foray into Boomer's was really a fishing expedition that involved random warrant checks on any and all African-American males who were present in the bar. Tr. 11/7: 27

Further, upon entering the bar, the police officers did not observe Mr. Dancy in possession of a weapon or engaged in any conduct that could be defined as criminal. Moreover, fitting some, but not all aspects of the description broadcast by Detective Reardon did not give Trooper Walls probable cause to conduct an arrest of Mr. Dancy. Mr. Dancy was wearing a black leather jacket and that was not a part of Reardon's radio description of the suspect. Finally, Trooper Walls' representation that he "felt" a firearm in Mr. Dancy's hand, while it was inside his jacket pocket, does not itself create probable cause. This was an assumption or guess on the part of Trooper Walls since he never saw what was actually inside of Mr. Dancy's right pocket during the struggle.<sup>7</sup>

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<sup>7</sup>Detective Reardon testified that Mr. Dancy was in possession of at least one cellular telephone when he was arrested. Tr. 12/20: 34. It is just a plausible that what Trooper Walls felt through both the leather jacket and Dancy's hand was that telephone.

The credible evidence presented at the suppression hearing indicates that the .22 caliber handgun was not discovered in Mr. Dancy's jacket pocket. Rather, it was picked up off of the floor by Officer Hyland in the area of the physical struggle with Dancy. Tr. 12/20: 104. Coincidentally, this was the same area where Officer Hyland observed Kevin Jones slide a 9mm handgun along the floor under a pool table. See Officer Hyland's report/diagram, Exhibit 12. For all of the reasons stated, the officer's present did not have probable cause to conduct an arrest of Mr. Dancy.

II. THE REASONABLE SUSPICION REQUIRED TO INITIATE AN INVESTIGATORY STOP AND/OR PAT-FRISK FOR WEAPONS DID NOT EXIST WHEN TROOPER WALLS AND THE OTHER OFFICERS FIRST ENCOUNTERED THE DEFENDANT.

In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court held that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." Id. at 22. To withstand scrutiny, an officer "must be able to articulate something more than an inchoate and unparticularized suspicion or 'hunch.'" United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting Terry, 392 U.S. at 27) (internal quotations omitted).

Where a law enforcement officer lacks probable cause, but possesses a reasonable and articulable suspicion that a person has been involved in criminal activity, he may detain the suspect briefly to investigate the suspicious circumstances. United States v. Hurst, 228 F.3d 751, 757 (6<sup>th</sup> Cir.2000); See also Terry, 392 U.S. at 10. In evaluating whether there was reasonable suspicion, "we first determine whether the officer[s'] actions were justified at [their] inception, and if so whether the actions undertaken by the officer[s] following the stop were reasonably responsive to the circumstances justifying the stop in the first place as augmented by information gleaned by the officers during the stop." United States v. Trueber, 238 F.3d 79, 92 (1<sup>st</sup> Cir.2001). The second inquiry is whether the scope of the investigatory stop was reasonable under the circumstances. Id.

When determining whether reasonable suspicion exists, the totality of the circumstances known to law enforcement officers at the time of the stop is examined. This necessarily encompasses a review of the relative experience of the officers involved as well as the behavior and characteristics of the suspect. United States v. Quinn, 83 F.3d 917, 921 (7<sup>th</sup> Cir.1996). Police can sometimes consider otherwise innocent behavior in determining whether reasonable suspicion exists to detain a person. See Terry v. Ohio, 392 U.S. 1, 22-23 (1968).

"There is no scientifically precise formula that enables courts to distinguish between investigatory stops ... and ... 'de facto arrests.'" United States v. Zapata, 18 F.3d 971, 975 (1<sup>st</sup> Cir.1994).

In Mr. Dancy's case, reasonable suspicion did not exist for the following reasons: there was an important discrepancy between the dispatch description and Mr. Dancy's actual appearance; Detective Reardon never saw the person who fired the weapon enter Boomer's; and Mr. Dancy's behavior in the bar was not suspicious or threatening.

Although, as stated above, Mr. Dancy appeared to fit some aspects of the description transmitted by Detective Reardon (black male, sweatshirt with lettering, "cornrow" hairstyle), he was wearing a black leather jacket. Detective Reardon testified that the person he saw on the street who fired the weapon was not wearing a jacket. In addition, there were other black males in the bar, including Michael Bourne, who fit various aspects of the description given by Detective Reardon. See Exhibit 14 (booking photo of Michael Bourne).

It is well established that the police do not have to gamble with their safety when conducting investigations and are allowed to conduct a pat-frisk for weapons when the circumstances warrant it. However, such searches are not to be conducted as a matter of course during every investigative detention. See Ybarra v.

Illinois, 444 U.S. 85, 91-93 (1979). An officer can conduct a pat-down search for weapons when "he or she harbors an articulable and reasonable suspicion that the person is armed and dangerous." quoting United States v. Davis, 94 F.3d 1465, 1468 (10<sup>th</sup> Cir.1996). An officer's suspicion must be "articulable" because, "in determining whether the officer acted reasonably..., due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences that he is entitled to draw from the facts in light of his experience." Terry 392 U.S. at 27.

In Mr. Dancy's case, Trooper Walls and the other officers present were playing a "hunch" when they entered Boomer's looking for the shooter. They did not know if that person entered the bar or not and Mr. Dancy did not fit the description in that he was wearing a black leather jacket. If the Court agrees that the weight of the credible evidence presented at the suppression hearing suggests that Dancy simply turned and walked away from Walls when the police entered the bar, then Dancy did nothing suspicious or threatening. Therefore, there was no need for a pat-down search for weapons by Trooper Walls or the other officers.

In its memorandum, the Government cites the case of United States v. Maquire, 359 F.3d 71 (1<sup>st</sup> Cir.2004) in suggesting that what the police did with regard to Mr. Dancy could, in addition

to being a valid arrest predicated on probable cause, also be considered a valid Terry stop. Dancy's case is distinguishable from Maquire in one significant way; the officers in that case actually observed what they believed was a weapon in the waistband of the suspect. See Maquire, 359 F.3d at 74-75 . In that case, a large kitchen knife was taken from the suspect. Id.

If Maquire stands for the proposition that the boundaries of a Terry stop are flexible and that they are dictated by the objective observations of the police during the course of the stop, then more physical restraints can be imposed by the police in a situation where they actually observe a weapon on a suspect. In this case, Trooper Walls and his fellow officers saw no weapon before pouncing on and macing Mr. Dancy. These actions, in addition to the number of police officers present and Cesarini's drawing of his weapon, therefore exceeded the boundaries of a Terry stop under these particular circumstances and transformed the encounter into a de facto arrest.

#### CONCLUSION

For the reasons cited above, the defendant's motion to suppress the fruits of his illegal arrest should be allowed. The evidence suppressed would necessarily include the physical evidence allegedly obtained by the police in the aftermath of the

arrest (firearm, ammunition) and any statements allegedly made by the defendant while in police custody.

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By his attorney,

/s/Oscar Cruz, Jr.  
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CERTIFICATE OF SERVICE

I, Oscar Cruz, Jr., hereby certify that this document filed through the ECF system will be sent electronically to the registered participant, Assistant United States Attorney Antoinette E.M. Leoney, as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on December 11, 2006.

/s/Oscar Cruz, Jr.  
Oscar Cruz, Jr.